

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1423 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
  2. To be referred to the Reporter or not? : YES
  3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
  5. Whether it is to be circulated to the Civil Judge? : NO

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JASUBEN WD/O RAMESHBHAI M PATEL

Versus

DAHAYABHAI @ BHANABHAI DURLABHBHAI (CHHANABHAI)  
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Appearance:

MR SANJAY M AMIN for Petitioners  
MR SURESH K NAIK for Respondent No. 1  
RULE SERVED for Respondent No. 2  
  
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CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 18/04/2000

ORAL JUDGEMENT

1. The petitioners have filed this Civil Revision Application under Section 115 of the Code of Civil Procedure, 1908, challenging the judgment and order dated 17th June, 1999, passed by the learned Joint District

Judge, Surat below Applications Exh.14, 22 and 23 in Civil Misc. Application No.69 of 1994.

2. It appears from the record that deceased Rameshbhai Morarbhai Patel preferred appeal before the District Court at Surat against the order of learned Civil Judge (S.D.) in Regular Civil Suit No.427/84, which was decided on 7.5.1994. In the said appeal, there was a delay and therefore he preferred Civil Misc. Appln.No.69/94 under Section 5 of the Limitation Act, 1963, (for short 'the Act') for condonation of delay caused in filing the said appeal. During the pendency of the said application i.e. Civil Misc.Appln. No.69/94, deceased Rameshbhai Morarbhai died on 29.12.96. Thereafter the present petitioners submitted application Exh.14 on 23.11.98 for joining them as legal heirs in the said application. Thereafter an application Exh.22 was submitted by them for setting aside the abetment in the appeal on 18.3.99 and application Exh.23 was also submitted again for condoning the delay and setting aside the abetment.

3. All these three applications came to be disposed of by the District Court holding that the petitioners have failed in establishing the case and, therefore, there was no reason for condoning the delay and consequently all the three applications were dismissed by the aforesaid order dated 17th June, 1999.

4. Feeling aggrieved by the said order of the lower Appellate Court, the petitioners have preferred this Civil Revision Application before this Court.

5. It has been mainly contended here that the learned Joint District Judge has committed serious error of law in not allowing the condonation of delay application. That, in fact, it was not necessary for the petitioners to make application under Section 5 of the Act, as there was no delay and really speaking the application could be filed within span of three years in view of the provisions made in the Limitation Act. That, as a whole, the aforesaid order of the lower appellate court is illegal and, therefore, the present revision application has been filed challenging the said order of the appellate court.

6. I have heard learned advocates for the parties and have perused the papers. Now it has to be considered that the first petitioner is a widow of the deceased applicant Rameshbhai Morarbhai Patel; that the petitioner No.2 appears to be a daughter of the deceased; that the

petitioner No.3 and 4 appear to be minor son and daughter of the deceased applicant and, therefore, we have to consider the position where there are atleast two minors representing their interest before this Court. Here I am of the view that the interest of the minor is normally required to be protected by the court. For this purpose, we can also look the provisions of the Civil Procedure Code to show that the proceedings are not permitted to go ahead ex-parte against minor defendants. Therefore provisions have been made that it would be the duty of the court to appoint guardian for defending the case of the minors. That a provision has been made in Section 6 of the Limitation Act. The said provision makes it clear that where a person entitled to institute a suit or make an application for the execution of a decree is, at the time from which the prescribed period is to be reckoned, a minor or insane, or an idiot, he may institute the suit or make the application within the same period after the disability has ceased, as would otherwise have been allowed from the time specified therefor in the third column of the Schedule.

7. The learned advocate for the respondent has argued that provisions contained in Section 6 of the Limitation Act will apply only to the suit or to the execution petition and it will not apply to other proceedings. Now it is very clear that he had referred to a provision Sec.121 of the CPC. There it has been laid down that provision contained with respect to suits will be applicable to the applications also.

8. Any way, the deceased wanted to file an appeal and the appeal is the continuous proceeding of the suit. Moreover delay has been caused in filing the said appeal and therefore it cannot be said that the provisions made in Section 6 of the said Act is for a limited purpose for suit and execution petition only and it would not be applicable to any other proceedings of the civil nature. I am of the view that, looking to the provisions made in the CPC for defending the case of the minors, and considering the provisions made in Section 6 of the Limitation Act, it is ample clear that this provisions will extend to the miscellaneous proceedings apart from the suit and execution petition.

9. It is more so, when Section 7 further makes it clear that where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without the concurrence of such person, time will run against them all; but, where no

such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased. This also shows that the legislature has taken care to defend the cause of the person under disability.

10. Under the aforesaid circumstances, I am of the view that when two minors are already there as petitioners, their cause should be defended by condoning the delay.

11. Learned advocate for the respondent has also argued that the petitioners have shown total negligence and therefore the delay should not be condoned. In this respect, the petitioners have made it clear that after the death of the deceased Rameshbhai, an application was given to the former advocate but it appears that said application is not on record. During the course of the argument, it has been noticed that Mr.Nagar Sheth, was appearing for the petitioner in the past and thereafter advocate has been changed before the trial court. It is true that the petitioners' former advocate Mr.Nagar Sheth has not filed affidavit, who was appearing as an advocate in the past. At the same time, it has to be borne in mind that when parties engaged a new advocate then in some cases it is difficult for the parties to obtain affidavit of former advocate to say that though the petitioners had instructed him to file appropriate application, he had omitted to do so. In these circumstances, when a statement has been made in Exh.14 by the petitioners that the former advocate was instructed to file an application but it was not found on record and when the said fact has been supported by the affidavit of the petitioners and when there is no counter allegation on record, it can be said that the petitioners may be under an impression since they had instructed the former advocate Mr.Nagar Sheth to make appropriate application and hence they were late in filing application Exh.14.

12. In aforesaid view of the matter, it cannot be said that there was negligence, inaction or want of bonafide on the part of the petitioners. It has also been contended that the respondent had filed execution petition being Regular Execution Petition No.93/96 before the learned Civil Judge(J.D.), Surat, and in the said petition the petitioners have been joined as legal representatives of the deceased Rameshbhai Morarbhai Patel. Now when the petitioners have been joined in the execution petition in place of deceased Rameshbhai, then

again it could be good ground for joining them in the original proceedings by them in place the deceased Rameshbhai.

13. It has been contended on behalf of the respondent that, in the said execution petition, these petitioners have submitted that the deceased has died and the aforesaid Civil Misc. Application was going on and the said Civil Misc. Application No.69/94 was for condonation of delay and therefore they have submitted before the Executing Court that till disposal of the said matter, the execution petition should not proceed ahead.

14. This would show that the aforesaid application was within the knowledge of the petitioners, but as stated above, they have made a statement in the aforesaid application Exh.14, that the former advocate was instructed but it appears that the aforesaid applications could not be filed within the period prescribed under the law. The same fact has been narrated in ground (d) to the revision memo also. Under the circumstances, it cannot be said again that there was negligence on the part of the petitioners in submitting the aforesaid application.

15. The learned advocate for the respondent has also relied upon a decision of the Hon'ble Apex Court in P.K.Ramachandran Vs. State of Kerala and another reported in AIR 1998 Supreme Court p. 2276. There the delay was not condoned under Section 5 of the Limitation Act because the ground mentioned was that at the relevant time Advocate General's office was fed up with so many Arbitration matters pending consideration and therefore the matter could not be filed in time before the Hon'ble Apex Court. Considering the aforesaid aspect, the Hon'ble Apex Court found that the delay was not explained satisfactorily. Now, it is very clear that when delay has not been explained to the satisfaction of the court then it cannot be condoned.

16. Same way Superintending Engineer, Ukai Circle and another Vs. Arjunbhai Dabhubhai Godavale and others reported in 1999 (2) GLR page 1279 is a decision wherein the delay of 75 days was not condoned. The reason is that the aforesaid delay was due to procedural formalities by Government in filing the appeal, this stock phrase ground cannot be taken to be as an excuse for delay and this was not the ground for condoning the delay.

17. Another decision of this court shown by the

learned advocate for the respondent in the case of Patel Natvarlal Khodidas Vs. State of Gujarat reported in 1999(2) GLR p.1340. There also it has been laid down that sufficient cause was not made for condoning the delay.

18. Now what is a sufficient cause is also a question of fact to be dealt with and decided in the light of each case separately. It is very difficult to refer two identical cases for comparison.

19. Any way, in the present case, I find that the first petitioner is a widow, second petitioner is a daughter and two minors are son and daughter of the deceased Rameshbhai Morarbai and they have specifically said that they had earlier instructed the former advocate for filing appropriate proceedings. Moreover, they have also explained in the application that they did not know about the aforesaid judgment and therefore the said application could not be filed in time. The said fact is supported by the affidavit of the first petitioner.

20. In the aforesaid circumstances, I am of the view that the petitioners in the present case have satisfactorily explained the delay caused in filing the application for substitution of parties, and as stated above, there is no negligence, inaction or want of bonafide on the part of the petitioners for filing application late.

21. Learned advocate for the respondent has referred sale deed executed by the deceased husband of the first petitioner disposing of the property in question during the pendency of the suit before the trial court. It is his argument that the deceased has already disposed of the property and therefore the petitioners have no interest in the said matter and therefore the question of condonation of delay will not be arise. Now if this property is disposed of during the pendency of the suit then there would be some reference to it in the suit itself but it appears that the said proceedings did not come to the notice of the respondent and therefore they have instituted subsequent suit challenging the said sale also. Therefore decision with respect to that challenge can be arrived at in that particular matter. Therefore also it cannot be said that the present petitioners have totally lost interest and therefore the condonation of delay application should be rejected.

22. Learned advocate for the petitioners has argued at length that in the present case there is no question

of delay and the provisions contained in Articles 120 and 121 of the Limitation Act, 1963, will not be applicable. It is his argument that this articles will apply only in the cases of suit and appeal since there is a reference to the plaintiff and appellant in the said two articles. Therefore according to his argument, the matter before the district court was of Civil Misc.. Application, it was neither suit nor an appeal. Therefore this two articles will not apply. Since I have considered that this is a fit case for condonation of delay, it is not necessary to go into the said aspect as to whether Articles 120 and 121 will apply or will not apply to the facts of the case before us.

23. In that view of the matter, I do not find very much necessary to go into the decision of Jagdishbhai J.Desai Vs. Vidyaben Rambhai Patel (Decd.) through her heirs Khevinaben R.Patel reported in 1993(2) GLR p.1635 on the consideration as to whether the aforesaid two articles will apply or whether the matter would be governed by Article 137 of the Limitation Act, 1963. Same is the case with respect to the decision of Sumitraben Ratilal Shah and others Vs. Meghraj Trikamdas & Co. reported in 1979 GLR p.856, which also says regarding applicability of Article 137 of the Limitation Act, 1963.

24. Under the aforesaid circumstances, I am of the view that the petitioners have explained the delay satisfactorily and particularly when there are two minors on record, it would be just and proper to substitute the petitioners for the deceased Rameshbhai Morarbhai to have decision on merits so far delay application is concerned.

25. In aforesaid view of the matter, this Civil Revision Application is allowed. The order passed by the learned Joint District Judge dated 17.6.99 below applications Exh.14, 22 and 23 are set aside. The aforesaid applications are hereby allowed and the delay caused in filing application for substituting the petitioners for the deceased Rameshbhai Morarbhai Patel is ordered to be condoned. The technical abetment which has arisen on account of non application within 90 days at the first instance and 60 days thereafter under Article 120 and 121 of the Limitation Act is ordered to be set aside. The present petitioners shall be substituted for the deceased Rameshbhai Morarbhai Patel in the aforesaid application being Civil Misc. Appln. No.69 of 1994. The learned Joint District Judge, Surat, will thereafter proceed further in the matter i.e. Civil Misc. Appln. No.69/94 in accordance with law.

Rule is made absolute to the extent indicated above. However, considering the facts and circumstances of the case, there shall be no order as to costs.

(D.P. Buch, J.)

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